The West Company *and* United Steelworkers of America, AFL–CIO, CLC, Local 815 and United Steelworkers of America, AFL–CIO, CLC. Cases 17–CA–19914, 17–CA–20006, and 17–CA–19914–2

May 4, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On October 25, 1999, Administrative Law Judge Thomas M. Patton issued the attached decision. The General Counsel, the Charging Parties, and the Respondent each filed exceptions and a supporting brief. The Respondent and the Charging Parties filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The principal issue presented in this proceeding is whether the Respondent's final offer lapsed between the time the offer was made and the time the Union accepted the offer. Contrary to the judge, we find, for the reasons set forth below, that the Respondent's final offer was still viable at the time of the Union's acceptance. We accordingly find that the Respondent committed an unfair labor practice by refusing to execute a collective-bargaining agreement incorporating the terms of the Respondent's final offer after the Union accepted it.

Factual Background

The factual background is set forth in full in the judge's decision and is summarized here. The parties were engaged in negotiations for a successor collective-bargaining agreement. On April 30, 1998,[2] the Respondent made a final offer for a complete collective-bargaining agreement, including the same dues-checkoff provision as contained in the parties' previous contract. The parties agreed to extend the expiring contract until May 3 to permit the union membership to vote on the final offer. On May 3, the union membership voted to reject the offer. On May 4, the Respondent implemented the terms of its final offer, including dues checkoff, and on that same date the Union began a strike.

On May 12, the Respondent's vice president, Richard Burkholder, and the Union's International representative, James Pope, spoke by telephone regarding the final offer and the return of employees to work. Burkholder adhered to the Respondent's final offer, and Pope told Burkholder he would get back to him. On May 13, Pope made an unconditional offer to return to work on behalf of unit employees. On May 14, the Respondent recalled the strikers to work. The returning workers were specifically advised by the Respondent's plant manager that they were returning to work under the terms of the Respondent's implemented final offer.

On May 18, employees filed a decertification petition. An election was conducted on August 11.[3] The Respondent asserts in its exceptions, as it did before the judge, that on August 12 it "concluded that the final offer had been withdrawn and no longer existed."[4] The Respondent did not, however, communicate to either the Union or the employees any change in status in the viability of the final offer. In contrast, when the Respondent discontinued dues checkoff on August 12, the Respondent specifically notified employees in writing that it had done so.

The Union accepted the Respondent's final offer by letter dated October 21. The Respondent does not contend that it ever explicitly withdrew its final offer prior to the Union's acceptance of it.

The Respondent replied to the Union's acceptance by letter dated October 23, which stated:

> Your letter of October 21, 1998 is premature. The matter of whether or not there will be further negotiations await the decision of the National Labor Relations Board on the decertification petition. At the present time, with the decertification petition still pending, you have no legal right to accept or reject any Company proposal, nor can the parties legally enter into negotiations.[5]

By letter to the Respondent dated December 23, the Union requested that the Respondent sign a written agreement incorporating the terms of the final offer. The Respondent

[1] The Charging Parties have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] All dates are in 1998.

[3] Case 17–RD–1530. The tally of ballots showed 80 for and 81 against the Union, with 4 determinative challenged ballots. On October 16, the Regional Director for Region 17 issued a report recommending, inter alia, that 3 of the 4 challenged ballots be opened and counted. On November 19, the Board by an unpublished decision adopted the Regional Director's recommendations. The revised tally of ballots showed 83 for and 81 against the Union. The Union was certified as representative of the bargaining unit employees on December 2.

[4] Respondent's exceptions and argument in support, p. 2.

[5] The Respondent thereafter sent a second letter to the Union, also dated October 23, which stated in its entirety: "Please be advised that the last offer made by the Company to the Union has been withdrawn."

has not complied with the Union's request. The unit employees have since May 4 worked under the terms of the Respondent's implemented final offer, including dues checkoff, until the Respondent discontinued dues checkoff on August 12. All other implemented terms have remained in place.

The Judge's Decision

The judge found that although the Respondent never explicitly withdrew its final offer prior to the Union's acceptance, circumstances existed that would lead the parties to reasonably believe that the offer had been withdrawn. The judge found the most significant circumstance to be that more than 5 months passed after the strike ended without the Union contacting the Respondent regarding the offer. The judge found further that there was no evidence that the Respondent believed the offer to be open at the time of the Union's acceptance. The judge concluded that the final offer had thus lapsed before acceptance, and the Respondent was under no obligation to enter into a written agreement containing the terms of its final offer.[6]

Discussion

It is settled that in collective bargaining,

> [A]n offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn.

Pepsi-Cola Bottling Co. v. NLRB, 659 F.2d 87, 90 (8th Cir. 1981), enfg. 251 NLRB 187 (1980). Accord: *NLRB v. Burkart Foam, Inc.*, 848 F.2d 825, 830 (7th Cir. 1988), enfg. 283 NLRB 351 (1987). "Whether or not an agreement has been reached between two parties is a question of fact for the Board to determine." *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982), enfg. 252 NLRB 43 (1980).

It is undisputed that the Respondent failed to explicitly withdraw its final offer prior to the Union's acceptance. In its exceptions, the Union argues that the offer was still viable because the Respondent believed the offer to be open at the time of acceptance. In contrast, the Respondent contends that it reasonably believed that the offer had been withdrawn on August 12, prior to the Union's acceptance. In these circumstances, the Eighth Circuit has explained:

> If one of the parties believes that the offer has lapsed, then it is necessary to consider whether the belief is reasonable, that is, whether circumstances would lead a party to reasonably believe that the offer has expired. Length of time between offer and acceptance is only one of the circumstances to be considered. (Citation omitted.)

Teamsters Local 688 v. NLRB, 756 F.2d 659, 662 (8th Cir. 1985). Accordingly, we now turn to the issue of whether the Respondent has shown that it reasonably believed that its offer had expired prior to the Union's acceptance.

The record contains substantive evidence inconsistent with such a belief. The Respondent initially replied to the Union's acceptance by stating that it was "premature." When faced with the Union's acceptance of the offer, the Respondent thus did not state that the acceptance was too late; the Respondent replied that the acceptance was *too early*. The Respondent further explained that whether the Union had "a legal right to accept or reject any company proposal" had to await the final outcome of the decertification election.[7] The clear implication is that the acceptance would be appropriate at a later time when the final result of the election was known. Conspicuously absent from the Respondent's reply is any reference to the Respondent's ostensible withdrawal of the offer on August 12. The Respondent's reply to the Union's acceptance establishes that the Respondent did

[6] The judge also dismissed the allegation that the Respondent unlawfully discontinued the deduction of unit employees' union dues on Aug. 12. The General Counsel and the Charging Parties have excepted. In *Hacienda Resort Hotel*, 331 NLRB 665 (2000) (Members Fox and Liebman, dissenting), a Board majority reaffirmed well-established precedent that an employer's obligation to continue a dues-checkoff arrangement expires with the contract that created the obligation. Accordingly, the judge correctly found that the Respondent lawfully discontinued dues checkoff after the contract expired.

The Respondent has excepted to the judge's ruling inadmissible evidence proffered by it to show that: (1) the Board's decision in the decertification proceeding was in error; and (2) the Union's internal ratification process accepting the final offer was defective. We find these exceptions to be meritless. With respect to (1), all representation issues raised by the Respondent were or could have been litigated in the prior, related representation proceeding. The Respondent did not offer to adduce at the hearing any newly discovered and previously unavailable evidence, nor did it allege any special circumstances that would have required the judge to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). With respect to (2), we agree with the judge, for the reasons set forth by him, that it is for the Union to construe and apply its internal regulations relating to what would be sufficient to amount to ratification. See, e.g., *Childers Products Co.*, 276 NLRB 709, 711 (1985), review denied mem. 791 F.2d 915 (3d Cir. 1986); *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979).

[7] The Respondent no longer pursues this position, which is erroneous as a matter of law. Under *Dresser Industries*, 264 NLRB 1088, 1089 (1982), "the mere filing of a decertification petition will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union."

not believe, either reasonably or otherwise, that its offer had lapsed.[8]

The record further shows that the Respondent discontinued dues checkoff on August 12, contemporaneous with its purported withdrawal of its final offer on that date. The Respondent argues that it discontinued checkoff as a consequence of its belief that its final offer had expired. The Respondent explicitly informed unit employees, in writing, of its discontinuance of dues checkoff. The Respondent in contrast remained silent regarding its supposed withdrawal of its final offer, despite its argument that discontinuance of checkoff was directly premised on the withdrawal of its offer. We find that the difference between the Respondent's conduct vis-à-vis its final offer and the cessation of dues checkoff supports our conclusion that the Respondent did not reasonably believe that the offer had lapsed.[9] Thus, we can find no compelling reason to view the Respondent's offer as having been withdrawn by silence.

The Respondent nevertheless argues that it reasonably believed that its offer was no longer viable because the Union had ignored the offer for an "unconscionable span of time." This contention is supported neither by record evidence nor case precedent. The Respondent tendered the final offer on April 30. The Respondent reaffirmed its final offer in discussions with the Union on May 12. The Union accepted the offer approximately 5 months later, on October 21. The Union's acceptance of the outstanding proposal on that date falls within what is considered a reasonable time under applicable case law. See *Teamsters Local 688 v. NLRB*, supra, 756 F.2d at 662 (offer viable where time period between offer and acceptance was "five or more months" and no negotiations or communications occurred during that period); see also *Chicago Tribune Co*., 303 NLRB 682, 690 (1991) (union's acceptance of outstanding proposal 4 months after it was renewed "well within what could be considered reasonable under applicable case law"), enf. denied on other grounds 965 F.2d 244 (7th Cir. 1992).

Nor does the record show intervening circumstances that would lead the parties to reasonably believe that the final offer had been nullified. Rather, the evidence establishes that the parties were at all material times operating under the implemented terms of the Respondent's final offer.[10] The Respondent's final offer thus became an existing condition of employment through the Respondent's unilateral action, and in these circumstances we cannot conclude that the parties would reasonably view the offer as one which was dying on the vine.[11] We further cannot agree with the judge's finding that the cessation of the strike and the filing of the decertification petition would lead the parties to reasonably believe that the offer had been withdrawn. The Respondent specifically disavows any reliance on a good-faith doubt as to the Union's majority status as a ground for its refusal to execute the contract. The Respondent further acknowledges that it considered that its offer was still viable long after the Union ended its strike on May 13. In any event, it is settled that a mere change in bargaining strength does not constitute a change in circumstance sufficient to negate the existence of a contract offer.[12]

Conclusion

As stated above, it is undisputed that the Respondent did not explicitly withdraw its final offer. Consequently, under well-established law, the offer remained open unless circumstances existed that would reasonably lead the parties to believe that the offer had been withdrawn. The Respondent has failed to show the existence of such circumstances. Therefore, we conclude that the Union accepted the final offer at a time when it was still on the table and susceptible to acceptance. We accordingly find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute a written contract incorporating the agreement reached with the Union. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 525–526 (1941).

CONCLUSIONS OF LAW

1. The West Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL–CIO, CLC, Local 815 and United Steelworkers of America, AFL–CIO, CLC, are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Sec-

[8] We have carefully considered that the Respondent, after responding at length to the Union's acceptance, sent an additional letter on the same day stating that the offer "has been withdrawn." This one-sentence letter is too ambiguous to establish that the offer was withdrawn *prior to* acceptance, as the Respondent argues.

[9] Cf. *Teamsters Local 688 v. NLRB*, supra, 756 F.2d at 663 (failure of employer to apprise union of withdrawal when it had opportunity to do so probative of employer's reasonable belief).

[10] The one exception is the Respondent's lawful discontinuance of dues checkoff on August 12.

[11] See *Williamhouse-Regency of Delaware*, 297 NLRB 199 (1989) (respondent's intention to implement terms of its final offer indicative that offer remained open), enfd. 915 F.2d 631 (11th Cir. 1990).

[12] *Pepsi-Cola Bottling Co. v. NLRB*, supra, 659 F.2d at 90; *Sunol Valley Golf Club*, 310 NLRB 357, 367 (1993) ("The apparent failure of the Union's strike did not amount to a change in negotiating circumstances sufficient for the parties reasonably to view the proposal as effectively withdrawn."), enfd. sub nom. *Ivaldi v. NLRB*, 48 F.3d 444 (9th Cir. 1995).

tion 8(a)(5) and (1) and Section 2(6) and (7) of the Act by refusing to execute the collective-bargaining agreement reached with the Union on October 21, 1998, embodying the terms of the Respondent's final offer.

4. The Respondent has not otherwise violated the Act as alleged in the second consolidated complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute a written collective-bargaining agreement reached by the parties on October 21, 1998, embodying the terms of the Respondent's final offer, we shall order the Respondent to reduce that agreement to writing and to sign it, and to give effect to its terms retroactively to October 21, 1998.[13] We shall further order the Respondent to make whole all employees, including any who may have since left its payroll, for any loss of earnings and other benefits suffered as a result of the Respondent's failure to sign the agreement reached, in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, The West Company, Kearney, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to execute the collective-bargaining agreement reached with the Union on October 21, 1998.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reduce to writing and execute the collective-bargaining agreement reached with the Union on October 21, 1998, and give effect to its terms retroactively to October 21, 1998.

(b) Make whole all employees, including any who may have since left its payroll, for any loss of earnings and other benefits suffered as a result of the Respondent's failure to execute the collective-bargaining agreement reached with the Union, with interest, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its place of business in Kearney, Nebraska, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 23, 1998.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

[13] The agreement reached does not include a dues-checkoff provision, because the Respondent effectively withdrew that provision prior to the Union's acceptance of the Respondent's final offer.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to execute the collective-bargaining agreement we reached with the Union on October 21, 1998.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL reduce to writing and execute the collective-bargaining agreement we reached with the Union on October 21, 1998, and give effect to its terms retroactively to October 21, 1998.

WE WILL make whole all employees, including any who may have since left our payroll, for any loss of earnings and other benefits suffered as a result of our failure to execute the collective-bargaining agreement reached with the Union, with interest.

THE WEST COMPANY

Richard C. Auslander, Esq., for the General Counsel.
Dean G. Kratz, Esq. (McGrath, North, Mullin & Kratz, P.C.), of Omaha, Nebraska, for the Respondent.
Robert E. O'Conner Jr., Esq., of Omaha, Nebraska, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

THOMAS M. PATTON, Administrative Law Judge. This matter was the subject of a hearing in Omaha, Nebraska, on July 15, 1999. United Steelworkers of America, AFL–CIO, CLC and its affiliated Local 815 filed the charges.[1] The alleged violations are that the Respondent has violated Section 8(a)(1) and (5) of the National Labor Relations Act. My findings and conclusions are based on the entire record, my observation of the demeanor of the witnesses, and consideration of the parties' oral arguments and briefs.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International and the Local are labor organizations within the meaning of Section 2(5) of the Act.

II. FACTS

The Respondent is a corporation that is engaged in the manufacture of rubber pharmaceutical products at a facility in Kearney, Nebraska.[2] The Respondent and the Union have had a collective-bargaining relationship for over 30 years.[3] The term of the most recent collective-bargaining agreement covering production and maintenance employees was from September 9, 1996, to April 30, 1998. The agreement was between Respondent and the International, on behalf of the Local. Beginning in late March 1998,[4] the Respondent and the Union began meeting to negotiate a new agreement. The Respondent representatives included Richard Burkholder, vice president of human resources for North America, and Sheila Fleer, plant manager. The Union's negotiation team included International Representative Ernie Cooper and Local President Mary Hakanson.

Negotiation sessions were held on various days in March and April. Meetings were conducted on a full-time basis during the last week of April and included a mediator. On April 30 the Respondent made a final offer. The final offer was for a complete collective-bargaining agreement. It included the same dues-checkoff provisions as contained in the expiring contract, but had changes in wages and other terms.

The parties agreed to extend the expiring contract through May 3 to permit the Union to submit the final offer to the membership. The Union did not agree to recommend ratification. Burkholder told the union representatives that he considered the parties to be at impasse and that the Respondent would implement the terms of the final offer on May 4, if it was not accepted. On May 3 the membership voted to reject the terms of the final offer. Shortly after midnight on May 4 the Respondent made unilateral changes consistent with the terms of the final offer and the Union began a strike. Dues checkoff was not discontinued at that time.

Once the strike began, James Pope began representing the International.[5] Pope called Burkholder and spoke with him by telephone on May 12. Both testified regarding the conversation. According to Burkholder, Pope said that he had arranged a meeting with the membership. Pope said that he wanted to get them back to work and that he had told the members that he had arranged to meet with the Company and continue negotiations. Burkholder stated that he responded that the Company was not continuing negotiations, that negotiations were over. Burkholder testified that he told Pope that the Company would listen to concerns about the final offer. Burkholder stated that Pope said he would call him back. Burkholder did not acknowledge scheduling a meeting with the Union.

Pope testified that Burkholder told him that the Company did not want to open the whole contract. Pope said he responded that there were two or three small items the Union wanted to talk about not involving more money, but possibly shifting the money. According to Pope, Burkholder agreed to meet under those conditions.

In a letter to Burkholder dated May 13 Pope made an unconditional offer on behalf of the employees to return to work and stated, "The USWA and the West Company will be meeting on Tuesday, May 19, 1998, to attempt to reach a settlement of this dispute." Pope did not testify that any meeting had actually been scheduled for May 19. There is no evidence any such

[1] The International and the Local and collectively as the Union.

[2] Richard Burkholder, vice president of human resources for North America testified that the Respondent is now known as West Pharmaceutical Services. No details were provided and there was no motion to amend the name of Respondent.

[3] The United Rubber, Cork, Linoleum and Plastic Workers of America, AFL–CIO was certified as collective-bargaining representative of the Respondent's production and maintenance employees in 1966. That labor organization merged with the United Steelworkers of America, AFL–CIO, CLC in 1995.

[4] Unless otherwise noted, all dates are 1998.

[5] Pope did not participate in negotiations before the strike began. There is no evidence of further participation by Ernie Cooper.

meeting was held. There is no evidence that the Union appeared for a meeting or that a meeting was canceled.

While in general agreement, there are conflicts in the testimony of Pope and Burkholder. To the extent they vary, Burkholder's testimony was more credibly offered and more probable. I find that in this conversation Burkholder adhered to the final offer[6] and expressed a willingness to meet, but that no meeting was scheduled and that Pope told Burkholder that he would get back to him. The Union did not contact the Respondent again regarding the final offer until October 21.

In response to the Union's May 13 letter, Respondent recalled the strikers beginning May 14. Before they were permitted to go to their work stations, Fleer read a statement to them advising them that they were returning under the terms of the implemented agreement.

On May 18 employees filed a decertification petition in Case 17–RD–1530. Unfair labor practice charges blocked processing of the petition for a time. Following disposition of the charges an election was conducted on August 11, pursuant to an election agreement. The result was 81 to 80 against the Union, with 4 determinative challenged ballots.

On August 12, the employees were given a written notice with their paychecks that checkoff of union dues had been discontinued. This was done without prior notice to the Union.[7]

On October 16 a Regional Director's report issued recommending, inter alia, that the challenged ballots of employees Veronica Bahde, Carl Wilson, and Colleen Mickelson be opened and counted and that the challenge to the ballot of Alicia woods be sustained.[8]

The Union sent Respondent a letter on October 21, stating that the membership had voted to accept the Respondent's April 30 final offer. The Respondent rejected the Union's attempted acceptance of the final offer with two different October 23 letters. One of the letters (apparently the first) took the position that acceptance was premature because the Board decision on the decertification was pending; the other letter stated that the offer was withdrawn.

On November 19, the Board adopted the Regional Director's recommendations. The ballots of Veronica Bahde, Carl Wilson, and Colleen Mickelson were opened and counted on December 1. A revised tally of ballots reflects a vote of 83 to 81 in favor of the Union. The Local was certified on December 2.

On December 23 the Union requested by letter that the Respondent meet with the Union to sign a written agreement incorporating the terms contained in the final offer. The Respondent has not complied with the request.

[6] There is extensive credible testimony by Burkholder and Fleer that in negotiations Respondent made it clear that its final offer was very firm.

[7] Burkholder testified that the Respondent also decided to follow the grievance procedure, but to not arbitrate grievances. There is no evidence that the Union was told of such a decision.

[8] The Union and the Respondent also filed election objections. The Regional Director recommended overruling the Respondent's objections and holding the Union's objections in abeyance.

III. ANALYSIS

The complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by discontinuing checkoff; by rejecting the Union's attempt to accept the final offer; and by not entering into a written agreement incorporating the terms of the final offer.

The Respondent contends that it was privileged to discontinue checkoff in the absence of a collective-bargaining agreement; that the Respondent had no duty to bargain with the Union following the election because the determination by the Regional Director and the Board regarding challenged ballots was contrary to law; that the union membership did not properly ratify the final offer; and that the final offer had lapsed or been withdrawn prior to acceptance.

A. The Status of the Union

The Respondent admits in its answer the appropriateness of the unit covered by the last collective-bargaining agreement and as certified by the Board in Case 17–RD–1430. The unit is:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its compression plant located at 923 West Railroad Street, Kearney, Nebraska, but excluding managerial employees, clerical employees, maintenance coordinator, guards, professional employees and supervisors as defined in the Act.[9]

The Respondent asserts, however, that the Union ceased to be the representative of the employees in the unit as a consequence of the vote in the decertification election. Specifically, the Respondent argues that the Board's certification was invalid because the votes of Veronica Bahde and Carl Wilson should not have been counted. The Respondent argues that if those two ballots had not been counted the Union would have lost the decertification vote.[10]

The Respondent offered to prove at the hearing that Bahde and Wilson did not have interests similar to those of the other employees in the unit because they had tendered resignations and that their employment ended shortly after the election. I sustained an objection to the introduction of such evidence on the ground that the issue was not before me for decision and had already been considered and decided by the Board. Respondent has expanded its argument on this issue in its brief and urges me to reverse my decision. I have considered the issue and have concluded that my ruling at the hearing was correct.

Accordingly, based on the last expired agreement and the December 2 certification, I conclude that the Union has been the collective-bargaining representative of the employees in the unit at all time material.

[9] The unit.

[10] In its dealings with the Union, however, the Respondent has not taken the position that the Union is not the representative of the employees in the unit.

B. The Discontinuance of Checkoff

Checkoff is a mandatory subject of bargaining. *U.S. Gypsum Co.*, 94 NLRB 112 (1951). Nevertheless, it is well settled that an employer's obligation to abide by the terms of a dues-checkoff provision ceases with the expiration of the contract. Moreover, an employer has no legal duty to give prior notice to a union before ceasing dues checkoff once the contract expires. *Talco Communications, Inc.*, 321 NLRB 762 (1996); *J. R. Simplot Co*., 311 NLRB 572 (1993); and *Bethlehem Steel Co*., 136 NLRB 1500 (1962), enfd. in relevant part 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

The General Counsel argues in his post hearing brief that the Board should reconsider the rule in *Bethlehem Steel* and its progeny regarding the unilateral cessation of checkoff. The General Counsel argues that the rule is inconsistent with other case law, including *NLRB v. Katz,* 369 U.S. l736 (1962), and not supported by the legislative history. I decline to reach the merits of the arguments advanced by the General Counsel regarding this issue. It is my duty to decide the case consistent with Board precedent. Under current Board law, an employer does not have an obligation to continue to honor a dues-checkoff clause once the contract has expired. *Bethlehem Steel Co.*, supra.

The General Counsel also makes the following argument in his brief. "Under current Board law, an employer does not have an obligation to continue to honor a dues-checkoff clause once the contract has expired." *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962). However, we do not have that situation in the instant case. Here, the General Counsel submits there was a contract in place at the time when the Respondent implemented its final offer on May 3. Therefore, the dues deduction authorization should have continued until that implementation had been lawfully withdrawn.

Authority is not cited to support this claimed distinction. The distinction is neither explained nor is it apparent. The words "contract in place" are apparently intended to indicate an unaccepted, unilaterally implemented, final offer for an entire contract where all provisions of the final offer, including checkoff, are implemented. While this may be a factual distinction from other reported cases involving the issue of checkoff revocation, it is not a meaningful distinction under *Bethlehem Steel* and its progeny. Thus, in *Bethlehem Steel* the Board concluded that a union's right to checkoffs in its favor is created by contract and is a contractual right, which continues to exist only so long as the contract remains in force. Consequently, when the contract terminates, an employer is free of its checkoff obligations to the union. Here, there was no collective-bargaining contract in effect between Respondent and the Union. Accordingly, I conclude that the Respondent's postimpasse unilateral changes did not obligate it to continue checkoff. A different result is not warranted because Respondent waited until August 12 to cease checkoff. Absent a contract, an employer is free to revoke checkoff, but revocation is not mandated. Accordingly, absent other circumstances, there is no reason why delay in revoking checkoff should render it unlawful. Indeed, under some circumstances, continuing checkoff for a period might be conducive to resolution of an impasse in bargaining. In any case, there is no contention here and no evidence to suggest that the Respondent evidence to suggest that the Respondent was motivated by anti-union considerations in ceasing checkoff, nor is there any evidence that the delay in ceasing checkoff was prejudicial to the Union.

C. The Union's Acceptance of the Final Offer

1. The ratification issue

The October 21 union letter to the Respondent states that the membership of the Local had voted to accept the Respondent's final offer, which had been rejected on May 3. The Respondent contends that the October 21 acceptance was fatally defective because it had not been effectively ratified by the membership. The Respondent argues that the parties had made ratification by the membership a condition of acceptance and that the vote conducted by the Union was not made in compliance with the Union's internal procedures. The Respondent offered evidence on this issue at the hearing, to which I sustained an objection. Respondent urges that I reconsider this issue, citing *Beatrice/Hunt-Wesson*, 302 NLRB 224 (1991); *Hertz Corp.*, 304 NLRB 469 (1991); and *Santa Rosa Hospital*, 272 NLRB 1004, 1006 (1984).

In *Hertz,* the Board held that a union's breach of an express oral bilateral agreement to submit the parties' negotiated contract to a ratification vote would justify an employer's refusal to implement the new contract's terms. Although duly executed by both parties, the contract could not become effective until the agreed condition precedent of ratification had been satisfied. The Board noted that the Supreme Court has stated that ratification agreements are enforceable if agreed to by the parties, citing *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 349 (1958). Ratification is a permissive subject of bargaining. *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971).

The Respondent's argument fails for several reasons. First, the vote by the membership to accept the final offer on May 3 was not ratification of a tentative acceptance of a contract proposal, as in the cases relied on by Respondent. Indeed, the Union was unwilling even to recommend acceptance of the final offer at that time.

Second, in contrast to the cited cases, the evidence does not establish that there was an agreement negotiated between the Respondent and the Union that conditioned acceptance of the final offer on ratification. At most, the evidence demonstrates that the Union unilaterally elected to leave the decision on acceptance or rejection of the final proposal to the membership, and the Respondent did not object. There is no evidence that Respondent had any significant concern prior to the strike with the process followed by the Union in determining whether the final offer would be accepted. In any case, there was no explicit agreement regarding ratification and the situation is unlike *Beatrice/Hunt-Wesson, Hertz,* and *Santa Rose*.

Third, even if the offer had been preconditioned upon ratification, it would be inappropriate to permit litigation of the Union's adherence to its internal procedures in conducting the vote. The Respondent has no standing to question the validity of the procedures used by the union in ratifying the agreement. *Martin J. Barry Co*., 241 NLRB 1011 (1979).

2. The status of the final offer when accepted

The General Counsel and the Union contend that the final offer made on April 30 had not been withdrawn when the Union indicated its acceptance of the final offer on October 21. It is argued that Respondent therefore violated the Act by denying, in its two October 21 letters to the Union, that a contract was created. It is further argued that the Act was again violated when the Respondent did not respond to the Union's December 23 demand that Respondent execute a written instrument containing the terms proposed in the final offer.

The Respondent maintains that the passage of time, as well as intervening events, invalidated the final offer before the Union indicated its acceptance on October 21.

In contract negotiations under the Act, the other party's rejection or counterproposal does not automatically terminate a contract offer. Rather, an offer may be accepted within a reasonable time, unless it is expressly withdrawn prior to acceptance, was expressly made contingent on some condition subsequent, or was subject to intervening circumstances which made it unfair to hold the offeror to his bargain. Thus, an offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn. *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89 (8th Cir. 1981), enfg. 251 NLRB 187 (1980). See also *Penasquitos Gardens*, 236 NLRB 994 (1978). Cf. *Arno Moccasin Co.*, 274 NLRB 1515 (1985).

There is no evidence that the Respondent in the present case took any steps to explicitly withdraw the offer made on April 30. The offer was clearly still open on May 3, when Burkholder spoke by telephone with Pope. However, there is no evidence that the Union ever approached the Respondent again regarding the offer before sending a letter on October 21. During the intervening period of over 5 months there were ample circumstances that would lead the parties to reasonably believe that the offer had been withdrawn.

The most significant circumstance is that more than 5 months passed without the Union contacting the Respondent after the strike ended on May 14. There is no evidence demonstrating that the Respondent considered the offer still open at the time of the acceptance. See *Lucas County Farm Bureau Cooperative Assn.*, 218 NLRB 1150 (1975), supplemental decision at 218 NLRB 1155. Also significant is the quick cessation of the strike and the decertification petition, suggesting a diminution in the Union's support. See *Associated Printers*, 225 NLRB 619 (1976). The Board views the cancellation of checkoff as an important consideration. *Lucas*, supra. Finally, the absence of evidence that the Union was considering the final offer is relevant in assessing the significance of the 5-month delay in the Union accepting the final proposal. *Crown Cork & Seal Co.*, 268 NLRB 1089 (1984).[11]

Based on the foregoing, I conclude that the Respondent's final offer had lapsed before the Union communicated its acceptance. Accordingly, the acceptance was ineffective and the Respondent was under no obligation to adhere to the agreement or to enter into a written agreement containing the terms of the final offer.

CONCLUSIONS OF LAW

1. The West Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, at all material times, has been, and is, pursuant to Section 9(a) of the Act, the exclusive collective-bargaining representative of all employees of the Respondent in the following unit:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its compression plant located at 923 West Railroad Street, Kearney, Nebraska, but excluding managerial employees, clerical employees, maintenance coordinator, guards, professional employees and supervisors as defined in the Act

3. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

[Recommended Order for dismissal omitted from publication.]

[11] The General Counsel also urges that I find that the statement in one of the Respondent's two October 23 letters that the final offer "has been withdrawn" establishes that the offer was still open to acceptance when the Union sent its acceptance. I find this argument unpersuasive. The quoted words are not inconsistent the offer lapsing prior to October 21.